88- 1855

Supreme Court, U.S.
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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GAILE HENRY, SR.,
*Petitioner*

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT,
*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

(1) Does a mandatory injunction in favor of a creditor which prospectively requires an ERISA plan participant to pay his retirement benefits to the creditor when the participant receives his benefits from the trustee of the plan constitute a wrongful garnishment or attachment which is prohibited by ERISA?

(2) In response to a creditor's request for a mandatory injunction against a plan participant, does an agreement by the participant's attorney to enter an order which prospectively requires a plan participant to deposit his retirement benefits, when received from the plan, into an Individual Retirement Account subject to further orders of the court constitute a voluntary alienation which is prohibited by ERISA?

(3) When the creditor is the plan sponsor, and when the plan administrator is an officer of the creditor and controls the actions of the creditor, does the following constitute an unlawful attachment prohibited by ERISA and a breach of fiduciary duty by the plan administrator:

a. causing the creditor to obtain a mandatory injunction prospectively requiring the participant to deposit his retirement benefits into an IRA, subject to further court orders, when such funds are received by the participant from the trustee of the plan;

b. causing the creditor's attorney to take possession of the participant's check from the trustee of the plan and refusing to let the participant have the check unless the participant agrees to restrict his right to deposit the funds into an IRA of his choice;

c. causing the creditor to obtain a court order requiring the participant to endorse the check in the possession of the creditor's attorney and then deposit the check into the registry of the court?

(4) Do the actions described in Issue No. 3 constitute prohibited transactions under ERISA?

(5) If the trustee of the plan knows about the creditor's actions, does the trustee have an affirmative duty to take steps to prevent such action?

(6) If the trustee acquiesces in the creditor's actions in order to permit the creditor to obtain the participant's benefits so that the creditor can use the money to pay the creditor's debt to the trustee, has the trustee engaged in a prohibited transaction and breached its fiduciary duty to the participant?

(7) Does the mere act by the trustee of writing a check and delivering it to the attorney for the creditor of a participant satisfy the obligation of the trustee to distribute benefits in accordance with the terms of the plan and ERISA?

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## STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on January 18, 1989. An Order denying the Petition for Rehearing was entered on February 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF STATUTORY PROVISIONS

(1) 26 U.S.C. § 401(a)(13):

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. . . .

(2) Treas. Reg. § 1.401(a)-13(b):

> *No assignment or alienation*—(1) *General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

(3) 29 U.S.C. § 1104(a)(1)(A)(i):

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries;

(4) 29 U.S.C. 1105(a):

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(5) 29 U.S.C. 1106(1)(D):

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

(6) 29 U.S.C. 1106(b):

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a

party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

## STATEMENT OF THE CASE

### A. Summary of Proceedings

This action was brought by Petitioner, Gaile Henry, Sr. ("Senior"), under the provisions of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., to recover the retirement benefits to which Senior was entitled under the provisions of a profit sharing and pension plan ("the Plan") sponsored by Senior's former employer, Beaumont Iron & Metal Corporation ("Bimco"), for which First City National Bank of Beaumont ("the Bank") acted as trustee. Both Senior and the Respondents filed Motions for Summary Judgment. The trial court denied Senior's Motion and entered summary judgment in favor of the Respondents. Senior appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit. This is a Petition for Writ of Certiorari to review the opinion of the Fifth Circuit affirming the Summary Judgment entered in favor of Respondents.

### B. The Parties

Senior is 68 years old. In 1965, he started a scrap metal business which is now known as Bimco. Eventually his son, Junior, gained control of the business and

terminated Senior's employment. Junior is the Plan Administrator of the Plan.

The Bank acted as trustee for the Plan. In addition, while acting as trustee the Bank was also a creditor of Bimco and was owed in excess of $700,000.00 by Bimco. The Bank considered the Bimco account to be a problem credit.

After Junior fired Senior, Junior decided to terminate the Plan and cause the Plan to distribute all benefits to the Plan participants, including Senior. At about the same time, Bimco filed suit against Senior in October 1986, alleging that Senior owed Bimco approximately $200,000.00 on a promissory note. Later, on December 12, 1986, Bimco amended its lawsuit and alleged that Senior had no assets, except his retirement benefits under the Plan, with which to satisfy any judgment that might be rendered in favor of Bimco against Senior. Bimco further alleged that Senior had threatened to hide his retirement benefits once they were distributed to him, and Bimco sought to enjoin Senior from using his retirement benefits for any purpose other than to pay the alleged note receivable to Bimco.

Since Senior had planned to deposit his retirement benefits into an Individual Retirement Account when he received his benefits from the Plan, on December 19, 1986 Senior's attorney agreed to the entry of an order requiring Senior to place his funds into an Individual Retirement Account when the funds were distributed by the Plan to Senior, rather than engage in an unnecessary evidentiary hearing in connection with Bimco's application for an injunction.

After the Plan was terminated, the Bank issued a check for $200,000.00 payable to Senior and gave the check to Bimco's attorney on December 31, 1986. Although Senior attempted to obtain possession of the check and deposit the funds into two separate Individual Retirement Accounts, Bimco's attorney refused to release the check to Senior unless Senior agreed to certain restrictions on the accounts which would prevent Senior's access to and use of the funds and would further subject the funds to control of the state court for the benefit of Bimco.

When Senior refused to agree to such restrictions and insisted on his right under ERISA to rollover his retirement benefits into an Individual Retirement Account, Bimco sought a court order, at a time when Senior was not represented by counsel, requiring Senior to endorse the check and deposit the check into the registry of the state court. Under threat of contempt, Senior endorsed the check and Bimco's attorney took the check and deposited it with the registry of the state court. Subsequently, a Summary Judgment was entered against Senior in the state court for approximately $250,000.00, the funds in the registry of the state court were awarded to Bimco, and Bimco in turn paid the money to the Bank to reduce Bimco's loan balance.

Throughout the course of the state court proceedings, the Bank closely monitored the efforts of Junior and Bimco to obtain Senior's retirement benefits for the purpose of ultimately reducing Bimco's loan at the Bank.

After Senior's retirement benefits were deposited into the registry of the state court, but before those funds were awarded to Bimco, Senior filed suit in federal district court under the provisions of ERISA and sought to enjoin

Bimco and the Bank from taking any further action to seize Senior's retirement benefits. Although the Bank was timely served with the federal court lawsuit, the Bank failed to take any action on behalf of Senior in the state court case to protect Senior's interest, and the Bank ultimately received the benefit of Senior's retirement funds.

## ARGUMENT

Under Chapter 61 of the Texas Civil Practice and Remedies Code, a writ of attachment is available if the Defendant has hidden or is about to hide his property for the purpose of defrauding his creditors, or if the Defendant is about to remove his property from the state without leaving an amount sufficient to pay his debts, or the Defendant is about to convert all or part of his property to money for the purpose of placing it beyond the reach of his creditors. These are precisely the grounds alleged by Bimco in its Application for Temporary Injunction. If Bimco had styled its request for an injunction an "Application for Prejudgment Writ of Attachment" or "Application for Prejudgment Writ of Garnishment", and had sought to levy the writ of attachment or writ of garnishment against the assets in the Plan, there would have been an obvious and flagrant violation of the specific provisions of ERISA and the Plan.

Since Junior and Bimco had decided to terminate the Plan and, therefore, knew that benefits under the Plan would soon be distributed to Senior and the other Plan participants, Bimco did two things in an attempt to avoid the strict provisions of ERISA. First, Bimco styled its pleading "Application for Temporary Injunction" rather than "Application for Writ of Attachment". Second,

rather than seeking an attachment of the funds on deposit in the Plan, Bimco sought a mandatory injunction requiring Senior's retirement benefits to be deposited by Senior in the registry of the court upon receipt of the retirement benefits by Senior. From the perspective of Senior, the result is the same—he involuntarily loses his retirement benefits to a creditor.

In order to circumvent the strict prohibitions of ERISA against attachment or alienation of retirement benefits, Bimco argues that the injunction is only effective once the funds have been "distributed" by the Bank on behalf of the Plan to Senior, and that after "distribution" the retirement benefits are no longer protected by ERISA. This argument puts form over substance, since from the perspective of Senior, the Plan participant, there is no difference in the result whether the Court enters an order for mandatory injunction against Senior or an order for writ of attachment against the Plan.

All of the actions taken by Bimco and the Bank were directed towards the purpose of obtaining Senior's retirement benefits for the purpose of reducing Bimco's loan to the Bank. This ultimate result was accomplished through the use of legal and equitable process issued by the state court.

The Opinion of the Fifth Circuit does not address or discuss either the law or the facts of this case. Instead, the per curiam opinion apparently sanctions the procedure used by Bimco to circumvent the express prohibitions of ERISA against garnishment, attachment, or voluntary alienation. This approach renders the prohibitions of ERISA absolutely meaningless since all a creditor needs to do is to obtain an injunction requiring a Plan

participant to deposit all retirement funds, when received from a qualified retirement plan, into the registry of the court in which the creditor is seeking to force his claim against the Plan participant. Either way, if the conduct of Binco is sanctioned by this Court, then all creditors of participants in ERISA plans will be able to circumvent the anti-assignment and anti-alienation provisions of ERISA by seeking injunctions which require the Plan participants to pay their benefits to the creditor upon distribution of benefits to the participant.

The provisions of ERISA should not be so narrowly construed since the purpose of ERISA is to "assure American workers that they may look forward with anticipation to retirement with financial security and dignity, without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society". S. Rep. No. 93-127, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. & Admin. News, pp. 4639, 4849 (1974). Congress intended that an employee's accrued benefits may not be reached by judicial process of any kind in aid of a third party creditor, let alone a fiduciary such as the Plan Administrator. Treas. Reg. § 1.403(a)-13(b)(1); *Tenneco v. First Virginia Bank of Tidewater,* 698 F.2d 688 (4th Cir. 1983); *General Motors Corp. v. Buha,* 623 F.2d 455 (6th Cir. 1980).

## CONCLUSION AND REQUEST FOR RELIEF

Although the opinion of the Court of Appeals does not specifically address or discuss either the facts or the law involved in this case, the result reached by the Court of Appeals threatens to undermine the integrity of the entire retirement system since it allows creditors to seize all retirement benefits through the use of mandatory injunctions. Accordingly, it is important that the Supreme Court grant this Petition for Writ of Certiorari and review this case.

Respectfully submitted,

By: /s/

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*Counsel of Record*
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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading has been sent by certified mail, return receipt requested, to the following attorneys of record this 12th day of May, 1989.

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/s/
C. LELAND HAMEL

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-2192

---

GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON AND METAL
CORPORATION, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the
Eastern District of Texas

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ON PETITION FOR REHEARING

(February 15, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS M.REAVLEY
United States Circuit Judge

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 88-2192

---

GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON & METAL CORP., ET AL.,
Defendants-Appellees.

---

Appeal from the United States District Court for the
Eastern District of Texas
(CA-B-87-0503)

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(January 18, 1989)

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Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. A. NO. B-87-0503-CA

GAILE HENRY, SR.

v.

BEAUMONT IRON AND METAL CORPORATION, BEAUMONT IRON AND METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., and FIRST CITY NATIONAL BANK OF BEAUMONT

(Filed February 25, 1988)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25th day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective

counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occurred as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Profit Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions

for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Signature Illegible
United States District Judge

Supreme Court, U.S.
FILED
JUN 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1855

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

GAILE HENRY, SR.,
*Petitioner*

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT,
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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20 pp

## QUESTION PRESENTED

Do the ERISA provisions governing prohibited transactions and prohibiting the alienation of plan benefits apply to actions taken with regard to distributions out of a qualified retirement plan after such distributions have been made and the plan has been terminated?

## LIST OF ALL PARTIES

GAILE HENRY, SR.

BEAUMONT IRON & METAL CORPORATION

BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN

GAILE HENRY, JR.

FIRST CITY NATIONAL BANK OF BEAUMONT

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BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT,
*Respondents*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*To The Honorable Supreme Court of the United States:*

### GROUNDS FOR DENIAL OF CERTIORARI

The Application for Certiorari should be denied. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals, or of a state court of last resort or of this Court. It is in keeping with

the accepted and usual course of judicial proceedings and does not call for this Court's exercise of its power of supervision. The case does not involve an important question of federal law.

## OPINIONS BELOW

The United States District Court of the Eastern District of Texas rendered summary judgment for Respondents on February 25, 1988 (Appendix A). Petitioner then appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit, where the Summary Judgment in favor of Respondents was affirmed on January 18, 1989 (Appendix B).

## STATEMENT OF THE CASE

Petitioner herein, Gaile Henry, Sr., brought this action against Respondents, Beaumont Iron & Metal Corporation ("the Corporation"), Beaumont Iron & Metal Corporation Profit Sharing Plan ("the Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("the Bank"), alleging violations of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., in connection with the distribution of monies out of the Plan. Throughout the period of time in question, Petitioner was the President of the Corporation, a member of the Corporation's Board of Directors, and an employee of the Corporation; the Corporation was the designated sponsor and administrator of the Plan; Gaile Henry, Jr. was the designated Advisory Committee of the Plan; and the Bank was the designated Trustee of the Trust maintained pursuant to the Plan.

On January 28, 1986 a note owed by Petitioner to the Corporation became due and payable. Petitioner failed to pay the principal and accrued interest as required by the terms of the note. As a result of Petitioner's default in the payment of the note, the Corporation initiated legal action against Petitioner on or about October 30, 1986 in the 58th Judicial District Court, Jefferson County, Texas in Cause No. A-125-223 (hereinafter referred to as the "State Court Action"). There are no facts in the records suggesting that the Bank entered an appearance or had any involvement, directly or indirectly, in any aspect of the State Court Action.

On June 13, 1986, at a meeting of the board of directors of the Corporation over which Petitioner presided as President, the Board of Directors voted to terminate the Plan. Later, on or about November 26, 1986, S. L. Greenberg ("Greenberg"), attorney for the Corporation, notified the Bank of the Board's decision to terminate the Plan, effective November 30, 1986, and requested distribution of all assets of the Plan to its participants. On December 24, 1986, the Bank distributed all funds from the terminated Plan to all participants entitled to receive distributions except for Petitioner. At or about the same time, Petitioner's attorney, acting with the actual, implied or apparent authority of Petitioner, requested that the Bank distribute to Greenberg two checks payable to Petitioner in the respective amounts of $79,146.19 and $200,000.00, with which request the Bank complied, on December 31, 1986. When this distribution was made, the Bank had no knowledge of the State Court Action pending between Petitioner and the Corporation or of the possible involvement of the distributed funds in that litigation.

On January 6, 1987, after the Plan had been terminated and all distributions had been made to the Plan participants, the State Court entered an Agreed Temporary Order, pursuant to an agreement between Greenberg and Petitioner's counsel, which required that the $200,000.00 check be placed in an account segregated from other funds of Petitioner and not distributed, transferred or pledged until further order of the State Court or an agreement in writing was signed by all parties.

Subsequently, Petitioner failed or refused to comply with the Order of January 6, 1987. The Corporation filed a Motion to Enforce the Agreed Temporary Order on February 17, 1987. After a hearing on February 24, 1987, the State Court entered an Order granting the Corporation's Motion and ordered deposit of the $200,000.00 check into the registry of the State Court. On April 16, 1987, the State Court granted a Judgment in favor of the Corporation against Petitioner for damages exceeding $250,000.00. As set forth in the Judgment, the $200,000.00 check deposited in the registry of the State Court was awarded to the Corporation as partial payment of these damages.

Sometime after the entry of the Judgment in the State Court Action, the Corporation reduced the principal balance owed on its indebtedness to the Bank. Contrary to the allegations stated in Petition for Writ of Certiorari, there is no evidence in the record that the funds distributed to Greenberg out of the Plan were ever used by the Corporation to reduce its indebtedness to the Bank.

## ARGUMENT AND AUTHORITIES

In its Petition for Writ of Certiorari, Petitioner asserts that the entry of the Agreed Temporary Order by the State Court on January 6, 1987 was an involuntary attachment, garnishment or other legal or equitable process against Petitioner's interest in the Plan, and that such order violated the anti-alienation provisions of ERISA and the Internal Revenue Code. Petitioner also asserts that the Corporation and Gaile Henry, Jr. engaged in prohibited transactions as defined by 29 U.S.C. § 1106. In Petitioner's view, the Bank is liable to Petitioner as a co-fiduciary for these supposed violations of fiduciary duties by the Corporation and Gaile Henry, Jr., pursuant to 29 U.S.C. § 1105.

In response, the Bank would first show the Court that, as a matter of law, the anti-alienation rules were applicable to Petitioner's plan benefits only until the Bank made a distribution of those benefits. The law is settled that once monies are distributed out of a qualified plan, the distributed funds are no longer protected from attachment by creditors even though such funds may be traced back to a plan fully protected by the provisions of ERISA. *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688, 691 (4th Cir. 1983). In this case, the distribution of funds to Petitioner was completed on December 31, 1986, prior to the entry by the State Court of the Agreed Temporary Order restricting the transfer of such funds.

Second, the record is undisputed that, as a matter of law, Petitioner was in actual or constructive receipt of his interest in the Plan on December 31, 1986. On that date, the Bank distributed the two checks to Greenberg

with the consent of Petitioner's duly authorized attorney, who received them for and on behalf of the Petitioner. Being a cash basis taxpayer, the Petitioner is subject to the constructive receipt doctrine. Thus, he is deemed to have received income not in his actual possession if such funds were nonetheless available to him in such a manner that his control over them was not subject to any substantial limitations or restrictions. 29 U.S.C. § 451(a). *Arnwine v. C.I.R.*, 696 F.2d 1102 (5th Cir. 1983). The fact that the $200,000.00 check remained uncashed or undeposited until February 24, 1987, when Petitioner physically endorsed it under Court Order, is irrelevant in determining the date of distribution. In addition, in *Arnwine,* the Fifth Circuit Court of Appeals held that the receipt of income by the taxpayer's agent subject to self-imposed limitations on actual distribution to the taxpayer was actual receipt under the agency theory. In this case, there is no dispute that Petitioner's attorney, acting on his behalf and at his request, authorized Greenberg to take possession of the $200,000.00 check so that Petitioner would be in receipt of the check for tax purposes in 1986. Thus, Petitioner was in receipt of the $200,000 check prior to the State Court's Order of January 6, 1987.

Third, the provisions of ERISA applicable to prohibited transactions do not apply to Plan benefits after distribution or termination of the Plan, as a matter of law. The Plan was terminated prior to the Corporation taking any action with respect to Petitioner's retirement benefits in the State Court Action. It has been previously held that ERISA fiduciary standards, including the rules against prohibited transactions, are inapplicable to transactions in which a Trustee has allegedly engaged *after*

the employer/sponsor of the Plan has voluntarily terminated the Plan in accordance with 29 U.S.C. § 1341 *et seq. District 65, U.A.W. v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468 (S.D.N.Y. 1983).

Fourth, Petitioner's conduct in the State Court Action estops him from challenging the Bank's actions since, as the facts show, all the Bank ever did was what Petitioner asked him to do. Accordingly, the Petitioner is equitably estopped from claiming that the distribution of Plan benefits was improper or unauthorized. See Brief of Appellee, First City National Bank of Beaumont, filed with the United States Court of Appeals for the Fifth Circuit, page 32.

There are additional grounds for affirming the decision below. For example, the facts are undisputed that Petitioner failed to exhaust his administrative remedies under the Plan after receipt of a denial of benefits which, as a matter of law, bars him from asserting any entitlement to such benefits prior to termination of the Plan. See Brief of Appellee, First City National Bank of Beaumont filed in the United States Court of Appeals for the Fifth Circuit, page 35. Additionally, the undisputed facts show that, as a matter of law, Petitioner was not entitled to a distribution of Plan benefits prior to the termination of the Plan, since Petitioner did not terminate service during 1985 or 1986, a condition precedent to entitlement. See Brief of Appellee, First City National Bank of Beaumont, filed in the United States Court of Appeals for the Fifth Circuit, page 42.

Finally, it should be noted that Petitioner's case against the Bank is based wholly on suspicion, innuendo, and inferences lacking any basis in fact. There is no evidence

in the record of a formulated plan or concerted action by the Corporation and the Bank "directed towards the purpose of obtaining [Petitioner's] retirement benefits for the purpose of reducing [the Corporation's] loan to the Bank." There is no evidence in the record that the Bank "closely monitored" progress of the State Court Action. In fact, the evidence is undisputed that prior to distribution of the checks to Greenberg, the Trust Department of the Bank did not know of the State Court Action or of any alleged attempt or threatened attempt by the Corporation to subject the distribution to the State Court's orders. The Fifth Circuit's opinion correctly analyzed the legal issues and the facts in the record and reached the correct result.

Petitioner's argument that reversal of the Circuit Court's decision is necessary in order to avoid rendering the prohibitions of ERISA meaningless is nonsense. Without citing this Court to a single statute, regulation or case which would impose the fiduciary duties of ERISA upon a trustee *after* termination of a plan and distribution of its assets, Petitioner is asking this Court to expand the protections of ERISA beyond the bounds intended by Congress or contemplated by prior decisions of this Court.

## CONCLUSION

The Circuit Court correctly affirmed the granting of the Summary Judgment in favor of the Respondent, First City National Bank of Beaumont, and Certiorari should be denied.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN

By: _____

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*Counsel of Record for Respondent, First City National Bank of Beaumont*

## CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been sent to each of the below named parties on this _____ day of June, 1989.

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JAMES L. WEBER

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. A. NO. B-87-0503-CA

GAILE HENRY, SR.

v.

BEAUMONT IRON AND METAL CORPORATION, BEAUMONT IRON AND METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., and FIRST CITY NATIONAL BANK OF BEAUMONT

(Filed February 25, 1988)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25th day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective

counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occurred as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Profit Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions

for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Signature Illegible
United States District Judge

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 88-2192

---

GAILE HENRY, SR.,
Plaintiff-Appellant,

v.

BEAUMONT IRON & METAL CORP., ET AL.,
Defendants-Appellees.

---

Appeal from the United States District Court for the
Eastern District of Texas
(CA-B-87-0503)

---

(January 18, 1989)

---

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.

Supreme Court, U.S.
FILED
JUN 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1855

In The

# Supreme Court of the United States

October Term, 1988

GAILE HENRY, SR.,

*Petitioner,*

v.

BEAUMONT IRON & METAL CORPORATION, BEAUMONT IRON & METAL CORPORATION PROFIT SHARING PLAN, GAILE HENRY, JR., AND FIRST CITY NATIONAL BANK OF BEAUMONT

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Do the protections of ERISA remain in force once all benefits are paid and the plan is terminated?

2. Did the court of appeals correctly affirm the U. S. district court's dismissal of Petitioner's complaint and granting Respondents' motions for summary judgment by concluding that the "Agreed Temporary Order" consented to by Petitioner and signed by Petitioner's attorneys was not prohibited by ERISA and did not constitute a wrongful garnishment or attachment of Petitioner's benefits?

3. Was the court of appeals correct in affirming the U. S. district court's granting of the Respondents' motions for summary judgment by concluding that no breach of any fiduciary duty owed Petitioner occured by:

(a) The agreed temporary order requiring the Petitioner, upon distribution from the Retirement Plan, to deposit a portion of his retirement benefits into an Individual Retirement Account or interest bearing account, subject to further court orders;

(b) Respondent Beaumont Iron & Metal Corporation's ("BIMCO") attorney taking possession of a check representing a portion of a distribution to the Petitioner pursuant to an agreement between the attorneys for Petitioner and Respondent BIMCO, in contemplation of the state court signing the "Agreed Temporary Order;"

(c) After distribution of the benefits, the signing of a court order requiring the Petitioner to comply with the "Agreed Temporary Order" and deposit a portion of the distributed funds into the registry of the court?

## LIST OF PARTIES

1. Gaile Henry, Sr., Petitioner.

2. Beaumont Iron & Metal Corporation, Respondent.

3. Beaumont Iron & Metal Corporation Profit Sharing Plan. This Plan is no longer in existence and is listed here only for completeness and continuity of the Brief.

4. Gaile Henry, Jr., Respondent.

5. First City National Bank of Beaumont, Respondent.

6. Sue Henry Guseman, Shareholder of Beaumont Iron & Metal Corporation.

7. Mark Freeman, Attorney for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

8. S. L. Greenberg, Attorney for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

9. Wells, Peyton, Beard, Greenberg, Hunt and Crawford, of Counsel for Beaumont Iron & Metal Corporation, Beaumont Iron & Metal Corporation Profit Sharing Plan, and Gaile Henry, Jr.

10. James Weber, Attorney for First City National Bank of Beaumont.

11. Mehaffy, Weber, Keith & Gonsoulin, of Counsel for First City National Bank of Beaumont.

12. C. Leland Hamel, Attorney for Petitioner.

13. Hamel, Rouner, Reigel & Strong, of Counsel for Petitioner.

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## CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

In an unpublished *per curiam* opinion, the United States Court of Appeals for the Fifth Circuit affirmed the order of the district court granting Respondents' motions for summary judgment, denying Petitioner's motion for summary judgment, and entering final judgment. Included as Appendix A is the Order Denying Petitioner's Petition for Rehearing. The court of appeals' opinion is included as Appendix B. The order granting Respondents' motions for summary judgment, denying Petitioner's motion for summary judgment and entering final judgment is included as Appendix C.

## STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 18, 1989. An order denying the petition for rehearing was entered on February 15, 1989. Under 28 U.S.C. § 1254(1), Petitioner asks this Court to grant writ of certiorari.

Review of a petition for a writ of certiorari is a matter of judicial discretion. Supreme Court Rule 17.1. Additionally, the Court will exercise its discretion and grant certiorari only when there are "special and important reasons therefor." Supreme Court Rule 17.1.

Respondents urge the Court that there are no special and important reasons for granting review in this case. Petitioner fails to identify specific reasons for granting review by writ of certiorari. In deciding this case, the Court of Appeals for the Fifth Circuit did not decide an

important federal question contrary to established precedent which should be settled by this Court. Supreme Court Rule 17.1(c). Any federal question which may be raised by Petitioner simply does not rise to the level necessary for review by this Court.

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614 (1955), citing *Magnum Import Co. v. Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922 (1923).

## STATEMENT OF THE CASE

This action was brought by Petitioner, Gaile Henry, Sr., on April 10, 1987, under the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. §1001, et seq. This case was filed against BIMCO, Beaumont Iron & Metal Corporation Profit Sharing Plan ("Profit Sharing Plan"), and First City National Bank of Beaumont ("Bank"), which acted as trustee of the profit sharing plan. Petitioner and each Respondent filed motions for summary judgment. The trial court granted each Respondent's motion for summary judgment and denied Henry's motion. Henry appealed the judgment of the trial court to the Court of Appeals for the Fifth Circuit. In a *per curiam* opinion, the court of appeals affirmed the trial court.

## STATEMENT OF FACTS

Through a colored and skewed recitation of the purported facts, Petitioner seeks to create a cause of action under ERISA. Petitioner incorrectly states that the court of appeals' opinion did not address or discuss either the law or the facts of this case. (Page 7, Petition for Writ of Certiorari). Petitioner fails to mention that the trial court, in considering all motions for summary judgment had extensive affidavits, deposition testimony, and numerous exhibits before it at the time the order granting Respondents' motions for summary judgment were granted. This extensive record, including Petitioner's affidavit, was reviewed, *de novo*, by the court of appeals. Additionally, oral argument was granted by the Court of Appeals before it rendered its *per curiam* decision. As set forth in its opinion, the Fifth Circuit concluded that:

(1) The profit sharing plan was terminated and full distribution of Petitioner's benefits was made to him in 1986.

(2) Petitioner's attorney agreed to the termination of the plan in November 1986 and requested the trustee bank's delivery to S. L. Greenberg on December 31, 1986 of checks payable to Petitioner, to be held by S. L. Greenberg.

(3) This delivery was made in order to ensure that Petitioner would be deemed to have received this distribution in 1986 for income purposes.

(4) No evidence existed that the Respondents breached any fudiciary duty owed to Petitioner under ERISA or the plan.

(5) The Bank acted only as authorized by Petitioner.

(6) Petitioner, on January 6, 1987, agreed to the state court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. (Appendix C).

After finding that no genuine issue of material fact existed as to this chronology, the court of appeals concluded that the election by Petitioner and the state court's subsequent judgment cannot be undone by this suit because the $200,000 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

Contrary to the representations of Petitioner, no mandatory injunction was issued by the Texas district court. The court of appeals, along with the trial court, properly concluded that no improper attachment, garnishment, or restriction occurred as a result of the Respondents' conduct. Throughout these proceedings, Petitioner has ignored the rudimentary facts recited above which have been found to exist by two tribunals. Petitioner ignores his own conduct and that of his counsel in these proceedings. As found by the court of appeals, the facts in this case do not support Petitioner's assertions that Respondents circumvented the anti-assignment and anti-alienation provisions of ERISA.

## ARGUMENT

A key issue in this litigation is the time of the distribution of Petitioner's vested benefits from the profit sharing plan. Once a distribution occurs, the funds are no longer protected from attachment by creditors. *See, Tenneco, Inc. v. First Virginia Bank of Tidewater,* 698 F.2d 688 (4th Cir. 1983). As has always been conceded by Petitioner in this litigation, the point in time when a participant in a qualified retirement plan incurs tax liability for distributions from a plan is also the time when a distribution will be recognized to have occurred for purposes of ERISA. In *Jones v. Commissioner,* 82 T.C. 586 (1984), the taxpayer assigned his unconditional right to receive funds in a protected retirement plan to his employer in exchange for the employer's agreeing to a reduction of a criminal charge against the employee. The employee signed a general release relinquishing his interest in the qualified retirement plan. On the date the employee was sentenced on the lesser charge, a check representing the amount due the employee from the qualified retirement plan was presented to the employee for his endorsement by the employer's attorney. "Without the check ever leaving the hands of Magna's [employer's] counsel, Petitioner endorsed the check back to Magna in accordance with the general release he [taxpayer] had previously executed." *Id.* at 588. The United States Tax Court also stated: "Further, even if we were to accept Petitioner's argument that he did not actually or constructively receive such funds, he clearly assigned his unconditional right to receive this money which would still require inclusion in his income." 82 T.C. at 590. The tax court went on to hold that a distribution had occurred.

Petitioner's voluntary agreement to restrict a portion of the funds he received from the profit sharing plan of BIMCO was not a restriction against the plan itself (which had been terminated), but spoke only about funds after they had been distributed to Petitioner. Under the *Jones* decision, this would still require Petitioner to include these funds in his income, which is the point in time that Petitioner admits a distribution would occur. Therefore, a distribution of the $200,000 resulted. As cited above, once a distribution occurs, the funds are no longer protected from attachment by creditors. *See, Tenneco, Inc. v. First Virginia Bank of Tidewater, supra.*

As correctly found by the court of appeals, Petitioner's attorney at the time the $200,000 check was issued by the bank recognized that the funds had been "distributed." Only Petitioner's belated efforts in this litigation, all of which occurred after the plan was terminated and all funds are admitted to have been distributed from the plan's trust account, have attempted to establish something sinister concerning the agreement between Mr. Greenberg and Petitioner's attorney.

The trial court properly concluded that, as a matter of law, no material issue of fact exists to support an essential element of Petitioner's alleged causes of action against Respondent under ERISA. The initial movant's burden under a Rule 56, Federal Rule of Civil Procedure, summary judgment motion is relatively light. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 165 (1986). The moving party shifts the burden of production of evidence to the non-moving party by simply pointing out that the non-movant plaintiff has failed to make a preliminary showing of an essential element of

his prima facie case. *Celotex*, 91 L.Ed.2d at 273-74. *See also, Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1192 (5th Cir. 1986). Once the burden of production shifts, the non-moving party must show that there is sufficient evidence in the pre-trial record to support a plaintiff's verdict at trial and not merely that sufficient evidence exists to raise an inference to be resolved at trial. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 587, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). The court must grant summary judgment even when factual conflicts exists if the conflicts are not substantial (genuine) or if they are not legally material. *See also*, S. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*. The Review of Litigation, 263, 268 & 278 (1987).

As found by the trial court and affirmed by the court of appeals, Petitioner failed to present any summary judgment evidence to create a genuine issue or material fact. Petitioner's shifting burden under *Celotex* was not addressed; the summary judgment was proper.

In addition to allegations in the federal courts, Petitioner also asserted in his state court action that his vested benefits in the plan had been improperly attached. However, the state court held: (i) Petitioner timely received a distribution of his vested benefits in the terminated plan on December 31, 1986; (ii) the distribution to Petitioner from the terminated plan was not protected by ERISA once the distribution had been made on December 31, 1986; and (iii) no improper alienation, attachment, or garnishment occurred as a result of the state court's entry of the agreed temporary order (signed January 6, 1987), or the order granting BIMCO's motion for protective

order for depositing funds in the registry of the court (signed February 25, 1987), or the final judgment granted BIMCO against Petitioner. (Exhibit 2, Respondents' First Supplement to their Motion for Summary Judgment). The final judgment in the state court action was appealed by Petitioner to the Texas Court of Appeals, 9th District, and affirmed in all respects. Petitioner's application for writ of error to the Texas Supreme Court was denied June 15, 1988. Contrary to Petitioner's belated assertions in this litigation, no illegal encroachment of Petitioner's retirement benefits occurred in the state court litigation.

## CONCLUSION

As found by the court of appeals, the record in this case supports the trial court's specific factual findings contained in the February 25, 1988 order granting summary judgment.

Petitioner has failed to direct this Court to a single case in support of his proposition that once all benefits are paid and a plan is terminated, the protection of ERISA remains in force and effect. The simple reason is that no such cases exist. Once a plan is terminated and the benefits are distributed, the congressionally mandated protections and restrictions of ERISA disappear.

Petitioner's argument is not based on judicial precedent or statute, but is based on his skewed and colored representation of the facts. Petitioner's representation that this case threatens to undermine the integrity of the entire retirement system is a gross mischaracterization of

the facts and legal issues in this case. The sum of Petitioner's legal authorities is contained on one page of Petitioner's Petition for Writ of Certiorari, none of which is directly applicable to the facts of this case.

Respondents request that the Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

MARK FREEMAN

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*Attorneys for Respondents,*
*Beaumont Iron & Metal Corporation,*
*Beaumont Iron & Metal Corporation Profit*
*Sharing Plan, and Gaile Henry, Jr.*

**APPENDIX A**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 88-2192

---

GAILE HENRY, SR.,

Plaintiff-Appellant,

versus

BEAUMONT IRON AND METAL CORPORATION, ET AL.,

Defendants-Appellees.

---

Appeal from the United States
District Court
for the Eastern District of Texas

---

ON PETITION FOR REHEARING
(February 15, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas M Reavley
United States Circuit Judge

---

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 88-2192

---

GAILE HENRY, SR.,

Plainitiff-Appellant,

versus

BEAUMONT IRON & METAL CORP., ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court for the Eastern District of Texas
(CA-B-87-0503)

---

(January 18, 1989)

Before REAVLEY, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:*

The summary judgment in favor of the defendants is affirmed because, as the district court said in its order of February 25, 1988, the Profit Sharing Plan was terminated and full distribution of plaintiff's benefits was made to

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

him in 1986. Plaintiff's attorney agreed to the termination of the plan in November and to the trustee bank's delivery on December 31 of checks payable to plaintiff, to be held by S. L. Greenberg. This delivery was made in order to ensure that plaintiff would be deemed to have received this distribution in 1986 for income purposes.

Prior to 1987 there is no evidence that any defendant breached a fiduciary duty owed to plaintiff under ERISA or the plan. The bank acted only as was authorized by plaintiff. Plaintiff on January 6, 1987 agreed to the court's order under which the $200,000 was to be deposited and to be subject to subsequent court judgment. That election by plaintiff and the court's subsequent judgment cannot be undone by the present suit, because the $200,00 was not protected by ERISA on January 6, 1987, and could not be said to have been wrongfully attached.

AFFIRMED.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

| | |
|---|---|
| GAILE HENRY, SR. ) | |
| VS. ) | |
| BEAUMONT IRON AND ) | |
| METAL CORPORATION, ) | |
| BEAUMONT IRON AND ) | C.A. NO. B-87-0503-CA |
| METAL CORPORATION ) | (Filed Feb. 25, 1988) |
| PROFIT-SHARING PLAN, ) | |
| GAILE HENRY, JR., and ) | |
| FIRST CITY NATIONAL ) | |
| BANK OF BEAUMONT ) | |

### ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FINAL JUDGMENT

ON THE 25 day of February, 1988, came on to be considered the Defendants, Beaumont Iron and Metal Corp. ("Beaumont Iron"), Beaumont Iron and Metal Corp. Profit Sharing Plan ("Profit Sharing Plan"), Gaile Henry, Jr., and First City National Bank of Beaumont ("First City")'s Motions for Summary Judgment. The Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment also came on for consideration. The Court, after reviewing the Defendants' Motions, the Plaintiff's Response thereto, the Plaintiff's Motion and the Defendants' Responses in Opposition thereto, as well as the affidavits, exhibits, arguments and authorities submitted by the respective counsel, finds that a distribution to Gaile Henry, Sr. (Plaintiff herein) of his vested benefits in the terminated Profit Sharing Plan was made to him, and the distributed

funds were not thereafter protected by ERISA. The Court finds that no improper alienation, attachment or garnishment occured as a result of the conduct of, or actions by the Defendants in Cause No. A-125,223 before the 58th Judicial District Court, Jefferson County, Texas (hereinafter "state court action"). At the time the Plaintiff filed this litigation (April 10, 1987), all funds had been distributed from the Profit Sharing Plan Trust Account and the Project Sharing Plan had been terminated. Additionally, Plaintiff failed to exhaust his administrative remedies as required by the Profit Sharing Plan and ERISA during the time preceding the distribution of his retirement benefits. Although funds may be traceable to an ERISA approved plan, the Court finds that those funds are not protected by ERISA once distribution is made. The Court also finds no evidence that First City, as Trustee of the Profit Sharing Plan, breached any of its fiduciary duties to Plaintiff. Based on the foregoing, the Court finds that Defendants are entitled to summary judgment, as no genuine issue of material fact exists; that the Defendants have no liability to the Plaintiff under ERISA or the causes of action set forth in Plaintiff's Original Complaint. The Defendants' Motions for Summary Judgment should be granted that the Plaintiff take nothing by reason of his suit. The Plaintiff's Motion for Summary Judgment should be denied. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants, Beaumont Iron and Metal Corp., Beaumont Iron and Metal Corp. Profit Sharing Plan, Gaile Henry, Jr., and First City National Bank of Beaumont's Motions for Summary Judgment are hereby GRANTED and said Defendants are DISCHARGED from any liability to the

Plaintiff and judgment is awarded the Defendants that the Plaintiff take nothing by reason of this suit. It is further,

ORDERED, ADJUDGED and DECREED that the Plaintiff, Gaile Henry, Sr.'s Motion for Summary Judgment is hereby DENIED.

SIGNED this 25th day of February, 1988.

/s/ Joe J. Fisher
UNITED STATES DISTRICT
JUDGE